



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAR Case 2021-012; Docket No. FAR-2021-0012; Sequence No. 1]

RIN 9000-AO29

Federal Acquisition Regulation: 8(a) Program

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration (SBA) to update and clarify requirements associated with the 8(a) program.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the addresses shown below on or before **[Insert 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2021-012 to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for "FAR Case

2021-012". Select the link "Comment Now" that corresponds with "FAR Case 2021-012". Follow the instructions provided on the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2021-012" on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

Instructions: Please submit comments only and cite "FAR Case 2021-012" in all correspondence related to this case. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Dana Bowman, Procurement Analyst, at 202-803-3188 or by email at dana.bowman@gsa.gov. For information pertaining to status, publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the

Regulatory Secretariat Division at 202-501-4755 or
GSARegSec@gsa.gov. Please cite FAR Case 2021-012.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement regulatory changes made by the Small Business Administration (SBA), in its final rule published in the Federal Register at 85 FR 66146 on October 16, 2020. SBA initiated a review of its regulations in response to the prior administration's government-wide regulatory reform initiative. As a result, SBA revised the 8(a) program regulations to more clearly articulate SBA's intent with regard to certain aspects of the 8(a) program to eliminate confusion and decrease burdens on procuring activities and 8(a) participants.

II. Discussion and Analysis

This rule proposes to modify subparts 19.6 and 19.8 as follows:

- Modify FAR 19.601(c) to clarify that the certificate of competency program is not applicable to 8(a) sole-source awards (see 13 CFR 125.5(a)(1)).
- Modify the heading at 19.804-5 to add blanket purchase agreements (BPAs) and add text to require that BPAs issued under part 13, including orders placed under part 13 BPAs, must be offered to, and accepted by SBA (see 13 CFR 124.503(h)).

-Modify FAR 19.805-2 to clarify 8(a) participants' eligibility criteria for two-step design-build competitive procurements (see 13 CFR 124.507(d)(3)); and FAR 19.808-1 to clarify eligibility criteria for 8(a) sole-source awards (see 13 CFR 124.501(g)).

-Revise 19.808-2 to add "follow-on 8(a) acquisitions".

-New text is proposed at section 19.810(a) to specify that SBA may appeal a contracting officer's decision that an acquisition previously procured under the 8(a) program is a new requirement not subject to the release requirements set forth in 13 CFR 124.504(d) (see 13 CFR 124.505(a)).

-Modify the heading at 19.815 to add notification requirements.

-Add new text at 19.815(d) and 19.815(e) to address notification requirements when a contracting officer decides that a requirement, previously procured under the 8(a) program, is a new requirement and not a follow-on requirement to an 8(a) contract; and when the procuring activity intends to procure a follow-on requirement using an existing limited competition contracting vehicle that is not available to all 8(a) participants and the current or previous 8(a) contract was available to all 8(a) participants.

-Add new text at 19.815(f) to address notification requirements when a mandatory source will be used for a

follow-on requirement to an 8(a) contract (see 13 CFR 124.504(d)(4)(ii)).

-Modify 19.816(c) to add a reference to SBA's eligibility criteria.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products, Including Commercially Available Off-the-shelf (COTS) Items or for Commercial Services.

This rule does not create new solicitation provisions or contract clauses or impact any existing provisions or clauses.

IV. Expected Impact of the Rule

This proposed rule implements SBA's final rule issued on October 16, 2020 (85 FR 66146) to update and clarify requirements associated with the 8(a) program. The changes are intended to clarify 8(a) program requirements and eliminate confusion among 8(a) concerns and procuring activities. The proposed rule will require contracting officers to submit BPAs issued under FAR part 13 and FAR part 13 BPA orders in the 8(a) Program to SBA for acceptance. Contracting officers will also be required to notify SBA of follow-on, non-8(a) procurements, and should notify SBA when a mandatory source will be utilized for a follow-on to an 8(a) contract. This proposed rule also clarifies eligibility requirements under the 8(a) program, which will assist both the Government and 8(a) concerns.

The proposed rule also clarifies that the SBA certificate of competency program does not apply to 8(a) sole-source awards; therefore, contracting officers will no longer be required to submit these actions to SBA. Given that this proposed rule clarifies 8(a) program requirements and reduces ambiguities for small business entities and procuring activities, any impact is expected to be beneficial to both Government and contractors and offerors. Any cost to the Government is not expected to be significant.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD,

GSA, and NASA will send the rule and the "Submission of Federal Rules Under the Congressional Review Act" form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612, because this proposed rule clarifies 8(a) program requirements and is expected to assist both small entities and the Government in implementing the 8(a) program. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to update and clarify requirements associated with the 8(a) program to align it with the regulatory changes made by the Small Business Administration (SBA) in its final rule dated October 16, 2020 (85 FR 66146).

The objective of this rule is to implement SBA regulatory changes made to the 8(a) program. SBA initiated a review of its regulations in response to the prior administration's government-wide regulatory reform initiative. As a result, SBA revised its 8(a) program regulations to eliminate confusion among small businesses and procuring activities. The proposed rule clarifies that the certificate of competency program is not applicable to 8(a) sole-source awards. Additionally, the proposed rule adds a requirement for the contracting officer to submit an offering letter to SBA for, and for SBA to accept, blanket purchase agreements (BPAs) under FAR part 13 and orders placed under part 13 BPAs. The rule also clarifies an 8(a) concern's eligibility for two-step design-build acquisitions and sole-source awards made under the 8(a) program. The rule also requires the procuring activity to submit a notification to SBA when a contracting officer determines that a procurement, previously procured under the 8(a) program, is a new requirement that is not subject to SBA release

requirements. A notification is also required when the procuring activity intends to procure a follow-on to an 8(a) procurement using an existing limited competition contract vehicle, not available to all 8(a) program participants, when the current or previous 8(a) contract was not a limited competition contracting vehicle. The legal basis for this rule is 40 U.S.C. 121(c), 10 U.S.C. chapter 137, and 51 U.S.C. 20113.

This proposed rule will impact small businesses who are 8(a) program participants and the Government by clarifying the 8(a) program regulations and ensuring follow-on requirements to 8(a) procurements remain in the 8(a) program when appropriate. Based on data in the System for Award Management, the estimated number of 8(a) small businesses is 5,659 and the estimated number of 8(a) joint ventures is 521. Therefore, the estimated number of total small entities to which the rule applies is 6,180. According to the Federal Procurement Data System, 8,037 8(a) sole-source awards and 1,224 8(a) set-aside awards were made in fiscal year (FY) 2019; 7,473 8(a) sole-source awards and 1,088 8(a) set-aside awards were made in FY 2020; and 6,369 8(a) sole-source awards and 1,251 8(a) set-aside awards were made in FY 2021. This averages out to 7,293 8(a) sole-source awards and 1,187 set-aside awards made in the last three fiscal years.

The proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2021-012), in correspondence.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

List of Subjects in 48 CFR Part 19

Government procurement.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR part 19 as set forth below:

PART 19—SMALL BUSINESS PROGRAMS

1. The authority citation for 48 CFR part 19 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

19.601 [Amended]

2. Amend section 19.601 by—

a. Removing from paragraph (b) the phrase “Small Business Administration (SBA)” and adding in its place “SBA”; and

b. Removing from the first sentence of paragraph (c) the phrase “Government acquisitions.” and adding in its place “Government acquisitions except for 8(a) sole-source awards.” and removing from the second sentence of paragraph (c) the word “also”.

3. Revise section 19.804-5 to read as follows:

19.804-5 Basic ordering agreements and blanket purchase agreements.

(a) The contracting office shall submit an offering letter for, and SBA must accept, each order under a basic ordering agreement (BOA) or a blanket purchase agreement

(BPA) issued under part 13 (see 13.303), in addition to the agency offering and SBA accepting the BOA or BPA itself.

(b) SBA will not accept for award on a sole-source basis any order that would cause the total dollar amount of orders issued under a specific BOA or BPA to exceed the competitive threshold amount in 19.805-1.

(c) Once an 8(a) participant's program term expires, the participant otherwise exits the 8(a) program, or becomes other than small for the NAICS code assigned under the BOA or the BPA, SBA will not accept new orders under the BOA or BPA for the participant.

4. Amend section 19.805-2 by—

a. Revising the second sentence in paragraph (b) introductory text;

b. Redesignating paragraph (b)(2) as paragraph (b)(3); and

c. Adding a new paragraph (b)(2).

The revision and addition reads as follows:

19.805-2 Procedures.

* * * * *

(b) * * * Eligibility is based on section 8(a) program criteria (see 13 CFR 124.501(g) and 19.816(c)).

* * *

(2) For a two-step design-build procurement, an 8(a) participant must be eligible for award under the 8(a)

program on the initial date for receipt of phase one offers specified in the solicitation (see 13 CFR 124.507(d)(3)).

* * * * *

5. Amend section 19.808-1 by—

- a. Redesignating paragraph (e) as paragraph (f);
- b. Adding a new paragraph (e);
- c. Removing from the newly redesignated paragraph (f) the phrase “sole source award” and adding in its place “sole-source award”.

The addition reads as follows:

19.808-1 Sole source.

* * * * *

(e) A concern must be a current participant in the 8(a) program at the time of an 8(a) sole-source award.

* * * * *

19.808-2 [Amended]

6. Amend section 19.808-2 by—

- a. Removing from the first sentence the phrase “8(a) acquisitions” and adding in its place “8(a) acquisitions, including follow-on 8(a) acquisitions,”; and
- b. Removing from the second sentence the phrase “negotiations among” and adding in its place “negotiations among eligible”.

7. Amend section 19.810 by adding paragraph (a)(4) to read as follows:

19.810 SBA appeals.

(a) * * *

(4) A contracting officer's decision that an acquisition previously procured under the 8(a) program is a new requirement not subject to the release requirements at 13 CFR 124.504(d)(1) (see 19.815(a) and (d)(1)).

* * * * *

8. Revise section 19.815 to read as follows:

19.815 Release and notification requirements for non-8(a) procurement.

(a) Once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements (see definition at 13 CFR 124.3) shall remain in the 8(a) program unless-

(1) SBA agrees to release the requirement from the 8(a) program for a follow-on, non-8(a) procurement in accordance with 13 CFR 124.504(d) (see paragraph (b) of this section); or

(2) There is a mandatory source (see 8.002 or 8.003; also see paragraph (f) of this section).

(b) To obtain release of a follow-on, non-8(a) procurement, (other than a mandatory source listed at 8.002 or 8.003), the contracting officer shall make a written request to, and receive concurrence from, the SBA Associate Administrator for Business Development.

(c)(1) The written request to the SBA Associate Administrator for Business Development shall indicate-

(i) Whether the agency has achieved its small disadvantaged business goal;

(ii) Whether the agency has achieved its HUBZone, SDVOSB, WOSB, or small business goal(s); and

(iii) Whether the requirement is critical to the business development of the 8(a) contractor that is currently performing the requirement.

(2) Generally, a requirement that was previously accepted into the 8(a) program will only be released for procurements outside the 8(a) program when the contracting activity agency agrees to set aside the requirement under the small business, HUBZone, SDVOSB, or WOSB programs.

(3) The requirement that a follow-on procurement must be released from the 8(a) program in order for it to be fulfilled outside the 8(a) program does not apply to task or delivery orders offered to and accepted into the 8(a) program, where the basic contract was not accepted into the 8(a) program.

(d)(1) When a contracting officer decides that a requirement previously procured under the 8(a) program is a new requirement and not a follow-on requirement to an 8(a) contract(s), the contracting officer shall submit a written notice to the SBA Associate Administrator for Business Development that the agency intends to procure the requirement outside the 8(a) program (see 19.810(a)(4)).

(2) The written notice shall include a copy of the acquisition plan, if available; performance work statement (PWS); statement of work (SOW) or statement of objectives (SOO); and the values of the existing 8(a) contract(s) and the new contract requirement.

(e)(1) When a contracting officer decides to procure a follow-on requirement to an 8(a) contract using an existing, limited competition contracting vehicle that is not available to all 8(a) participants and the current or previous 8(a) contract was available to all 8(a) participants, the contracting officer must submit a written notice to the SBA Associate Administrator for Business Development.

(2) The written notice shall include a copy of the acquisition plan, if available; PWS; SOW or SOO; and the values of both contracts.

(f)(1) When a mandatory source will be used for a follow-on requirement to an 8(a) contract, the contracting officer should notify the SBA Associate Administrator for Business Development at least 30 days prior to the end of the contract or order in accordance with 13 CFR 124.504(d)(4)(ii).

(2) The written notice should include a copy of the acquisition plan, if available; PWS; SOW or SOO; and the values of both contracts.

9. Amend section 19.816 by removing from paragraph (c) the word "criteria" and adding in its place "criteria (see 13 CFR 124.507(d))".

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